SUPREME COURT, U.S.

No. 1364

In the Supreme Court of the United States

OCTOBER TERM, 1969

DARWIN EARL SCHULTZ, PETITIONER

v.

HONORABLE MELVIN LAIRD, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1134

DARWIN EARL SCHULTZ, PETITIONER

v.

HONORABLE MELVIN LAIRD, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15–19) is reported at 417 F. 2d 775. The opinion of the district court is reported at 303 F. Supp 965.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1969. A timely petition for rehearing was denied on November 17, 1969. The petition for a writ of certiorari was filed on January 30, 1970. The

[1] The opinion of the district court is reproduced as an appendix to this brief (*infra*, pp. 13–24), since petitioner's appendix (see Pet. App. 1–14) fails to reproduce that opinion accurately.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, a member of the Minnesota Army National Guard, was properly ordered to active duty pursuant to 10 U.S.C. (Supp. IV) 673a for unsatisfactory performance of his reserve obligation.

STATUTES INVOLVED

10 U.S.C. (Supp. IV) 673a (codifying in part Section 101 (a) and (b) of Public Law 89-687 (80 Stat. 981)) provides:

> (a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—
>
> (1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;
>
> (2) has not fulfilled his statutory reserve obligation; and
>
> (3) has not served on active duty for a total of 24 months.
>
> (b) A member who is ordered to active duty under this section may be required to serve on active duty until his total service on active duty equals 24 months. If his enlistment or other period of military service would expire before he has served the required period under this section, it may be extended until he has served the required period.

50 U.S.C. App. (Supp. IV) 456(c)(2)(A) provides, in relevant part:

Any person, other than a person referred to in subsection (d) of this section, who—

(i) prior to the issuance of orders for him to report for induction; or

(ii) prior to the date scheduled for his induction and pursuant to a proclamation by the Governor of a State to the effect that the authorized strength of any organized unit of the National Guard of that State cannot be maintained by the enlistment or appointment of persons who have not been issued orders to report for induction under this title [sections 451, 453, 454, 455, 456 and 458–471 of this Appendix]; or

(iii) prior to the date scheduled for his induction and pursuant to a determination by the President that the strength of the Ready Reserve of the Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve cannot be maintained by the enlistment or appointment of persons who have not been issued orders to report for induction under this title [sections 451, 453, 454, 455, 456, and 458–471 of this Appendix];

enlists or accepts appointment, before attaining the age of 26 years, in the Ready Reserve of any Reserve component of the Armed Forces, the Army National Guard, or the Air National Guard, shall be deferred from training and service under this title [sections 451, 453, 454, 455, 456 and 458–471 of this Appendix] so long as he serves satisfactorily as a member of an organized unit of such Reserve or National Guard in accordance with section 270 of title

> 10 or section 502 of title 32, United States Code, as the case may be, or satisfactorily performs such other Ready Reserve service as may be prescribed by the Secretary of Defense. * * *

STATEMENT

Petitioner enlisted in the Minnesota Army National Guard on December 28, 1963. At that time, he signed an "Enlistment Record" which specified (C.A. App. 10–11):[2]

> I do hereby acknowledge to have voluntarily enlisted this 28th day of December, 1963, in the Army National Guard of the State of Minnesota and as a Reserve of the Army with membership in the Army National Guard of the United States for a period of (6) Six years under the conditions prescribed by law * * *.

He also signed "[i]n connection with [his] enlistment" an "Enlistment Agreement" (C.A. App. 8–9) which included the following provision:

> If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of 45 days or be reported to Selective Service for immediate induction.

Petitioner served satisfactorily with his National Guard unit until February 1967, when he decided that he was a conscientious objector and that he would no longer participate in the unit's program. He ceased attending drills, even though he had at that time made no application for a conscientious objector discharge.

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[2] "C.A. App." refers to the appendix in the court of appeals, a copy of which is on file with the clerk of this Court.

Consequently, on February 17, 1967, petitioner's commanding officer submitted to his Selective Service local board a DD form 44 indicating that petitioner was not participating satisfactorily as a member of the National Guard. A member of the National Guard who "satisfactorily performs" his Ready Reserve service is entitled to be deferred from induction,[3] and petitioner had previously been given a I–D Selective Service classification. Upon notification that petitioner was no longer participating satisfactorily, his local board withdrew the I–D classification and reclassified petitioner I–A.

Subsequent to being reclassified, petitioner applied to his local board for a conscientious objector classification. His application was denied, and he filed an administrative appeal. However, petitioner was over 26, and had been placed in category 5 of Class I–A; thus, he was advised by his draft board that his induction was not imminent, and that his appeal would not be considered until 120 days prior to any contemplated notice of induction (C.A. App. 14).

Meanwhile, petitioner continued his non-attendance at National Guard drills. He talked to his commanding officer about being discharged from the National Guard, but was unable to "communicate" with him. On July 26, 1967, he first wrote the National Guard to request a discharge and the forms for applying for a discharge as a conscientious objector. By letter

[3] 50 U.S.C. App. (Supp. IV) 456(c)(2)(A); see also 32 C.F.R. 1622.13.

of August 14, 1967, the National Guard replied that the forms for such an application were available at the armory in Mankato, and that it was necessary for him to come to the armory in order to make such an application (C.A. App. 26). Petitioner denies receiving this letter, and from September 1967 until January 2, 1968, he had no further contact with the National Guard. On the latter date he received orders issued under 10 U.S.C. (Supp. IV) 673a, to report for 18 months' active duty on January 17, 1968, as a result of his failure to perform his reserve obligation satisfactorily.

Petitioner requested that his orders to active duty be postponed until processing of an alleged application for a conscientious objector discharge was completed, and his attorney was informed by a Mr. Hagett of the National Guard office in Washington that petitioner's orders to active duty would be delayed or cancelled until his application for discharge was processed. However, as found by the district court, petitioner never did file a proper application (*infra*, p. 16, n. 1), and on February 1, 1968, he was advised that his orders to active duty had not been cancelled. Nonetheless, petitioner failed to report for active duty. On August 16, 1968, he was arrested as a deserter. At that time, petitioner filed the instant application for habeas corpus, challenging the validity of his activation pursuant to 10 U.S.C. (Supp. IV) 673a (C.A. App. 3).

Petitioner's application for a writ of habeas corpus was denied by the district court. It found that activation under 10 U.S.C. (Supp. IV) 673a did not vio-

late petitioner's rights, and that the National Guard, by reporting petitioner's unsatisfactory participation to his local draft board, had not ceded jurisdiction over petitioner to that board. The court of appeals affirmed on the basis of the opinion of the district court. It pointed out, however, that as a soldier on active duty petitioner had a right to file an application for discharge from the Army as a conscientious objector.

ARGUMENT

The holdings of both the district court and court of appeals are plainly correct. There is no conflict of decisions, and thus no warrant for further review by this Court.

1. Petitioner's basic contention is that his activation under 10 U.S.C. (Supp. IV) 673a violated his "Enlistment Agreement." This is essentially the same contention that was made and rejected in *Winters* v. *United States,* 281 F. Supp. 289 (E.D. N.Y.), affirmed *per curiam,* 390 F. 2d 879 (C.A. 2), certiorari denied, 393 U.S. 896; *Fox* v. *Brown,* 402 F. 2d 837 (C.A. 2), certiorari denied, 394 U.S. 938; *Karpinski* v. *Resor* (C.A. 3), No. 18,233, decided December 23, 1969; *Schwartz* v. *Franklin,* 412 F. 2d 736 (C.A. 9); *Winters* v. *United States,* 412 F. 2d 140 (C.A. 9), certiorari denied, 396 U.S. 920.[4] Moreover, the primary authority relied upon by petitioner, *Harmonson* v. *United States,* Civ. No. 68–2109–F (C.D. Calif.), decided

[4] See, also, *Morse* v. *Boswell,* 289 F. Supp. 812 (D. Md.), affirmed *per curiam,* 401 F. 2d 544 (C.A. 4), certiorari denied, 393 U.S. 1052; *Johnson* v. *Powell,* 414 F. 2d 1060 (C.A. 5).

March 18, 1969 (Pet. 9), was reversed *per curiam* by the Ninth Circuit (No. 24,005, decided July 7, 1969).

Petitioner voluntarily enlisted under the "conditions prescribed by law" (C.A. App. 10–11), and, as the above-cited cases have held, the conditions prescribed by law include future laws, such as 10 U.S.C. (Supp. IV) 673a (originally enacted in 1966 as P.L. 89–687), as well as laws currently in effect at the time of petitioner's enlistment.[5] See, *e.g.*, *Winters* v. *United States, supra,* 281 F. Supp. at 295–296; *Fox* v. *Brown, supra,* 402 F. 2d at 841; *Johnson* v. *Powell,* 414 F. 2d 1060, 1065 (C.A. 5). Moreover, even apart from this language, petitioner's enlistment could not be effectively immunized from Congress' enactment of new laws. See *Schwartz* v. *Franklin, supra; Karpinski* v. *Resor, supra; Pfile* v. *Corcoran,* 287 F. Supp. 554 (D. Colo.).[6]

2. Petitioner contends that the National Guard was precluded from ordering him to active duty since it

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[5] Under the law at the time of petitioner's enlistment and as it currently stands, he is subject "[n]otwithstanding any other provision" of the Selective Service law to induction into the Armed Forces for two years if he fails to participate satisfactorily as a reservist. 50 U.S.C. App. 456(c)(2)(D). Consequently, there has always been statutory authority, although it has not in fact been employed, to induct petitioner for two full years of active duty.

[6] Petitioner argues that under 10 U.S.C. 672(e) he was entitled to 30 days' notice of his activation. (The petition refers to 28 U.S.C. 672(d), but petitioner evidently means 10 U.S.C. 672(e).) However, assuming the provision to be applicable, the most petitioner would be entitled to would be that he would not have had to report for active duty until February 1, 1968, 30 days after his receipt on January 2, 1968, of his orders to active duty. See *Fox* v. *Brown, supra,* 402 F. 2d at 841.

reported his unsatisfactory performance to his local draft board, which then changed his classification from I–D to I–A. However, under 50 U.S.C. App. (Supp. IV) 456(c)(2)(A), a member of the National Guard is entitled to be deferred "so long as he serves satisfactorily as a member of an organized unit of such Reserve or National Guard in accordance with section 270 of title 10 or section 502 of title 32, United States Code, as the case may be, *or satisfactorily performs such other Ready Reserve service as may be prescribed by the Secretary of Defense*" (emphasis added). Thus, petitioner's I–D classification was conditioned upon his satisfactory performance as a member of the National Guard. Upon his ceasing so to perform in February 1967, his local board was obligated to remove his I–D classification. But no action was taken by anyone which effectuated petitioner's discharge from the Ready Reserve. Consequently, he was still a member of the Ready Reserve on January 2, 1968, the date on which he was ordered to active duty.[7] Nothing in the Selective Service laws or regulations precludes calling such a reservist to active duty despite his having been previously reported to his local board for unsatisfactory performance of his reserve obligation.

[7] As is explained in *Johnson* v. *Powell*, *supra*, the National Guard is one of the components of the Ready Reserve, and a member of a National Guard unit enlists both in the National Guard and in the Ready Reserve of the Army. As part of petitioner's being ordered to active duty, he was discharged from the National Guard on January 16, 1968, but was not discharged from the Ready Reserve of the Army (C.A. App. 25).

3. Petitioner also contends that he could not be activated until his application for a conscientious objector discharge had been acted on by the National Guard. But the record establishes, and the district court found, that petitioner did not file a proper application (*infra,* p. 16; see also C.A. App. 21). In response to petitioner's letters stating his desire for a conscientious objector discharge, the National Guard by letter of August 14, 1967, advised him that in order to complete such an application, he would have to appear in person at the National Guard Armory in Mankato (C.A. App. 26). He never did so appear, and consequently such an application was never properly made.[8] Although petitioner denies receiving the August 1967 letter, that does not change the fact that a proper application for a conscientious objector discharge was never made by him. Accordingly, the National Guard was under no obligation to await the outcome of petitioner's application for a conscientious objector discharge—which had never been made—before ordering him to active duty.[9] As the court of

[8] A set of the Army regulations explaining the procedures for a conscientious objector discharge (AR 135–25) was maintained at the National Guard armory and available for petitioner's examination (C.A. App. 22).

[9] *Lu[illegible] United States*, 402 F. 2d 297 (C.A. 5), cited by petitioner (Pet. 11), involves a National Guardsmen who was inducted by his draft board. The court of appeals ruled that the local board had to consider his application to it for a conscientious objector discharge. Since petitioner here was not inducted by his draft board, his application to it for a conscientious objector discharge has no bearing on his activation under 10 U.S.C. (Supp. IV) 673a. And, of course, petitioner never did file an application for a conscientious objector discharge with the National Guard.

appeals noted (Pet. App. 18), petitioner of course remains free to file an application for such a discharge from the Army, under the applicable Army regulations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1970.

APPENDIX

UNITED STATES DISTRICT COURT

D. MINNESOTA

FOURTH DIVISION

No. 4-68-Civ. 290.

DARWIN EARL SCHULTZ, PETITIONER

v.

HONORABLE CLARK CLIFFORD, SECRETARY OF DEFENSE, AND THE COMMANDING OFFICER OF FORT LEONARD WOOD, MISSOURI, THE SHERIFF OF HENNEPIN COUNTY, AND THE AGENT IN CHARGE OF THE OFFICE OF THE F.B.I. IN MINNEAPOLIS, MINNESOTA, RESPONDENTS.

MEMORANDUM

OCTOBER 22, 1968

Larson, District Judge.

Petitioner enlisted in the Army National Guard of Minnesota on December 28, 1963. He served satisfactorily until February of 1967 when he decided that he could no longer participate in the required National Guard drills. This decision was based on petitioner's conscientious objection to killing and war. Petitioner has not participated in any National Guard activities since February of 1967.

On February 17, 1967, the commanding officer of petitioner's unit sent a DD form 44 to petitioner's Se-

lective Service Local Board indicating that petitioner had ceased to serve satisfactorily as a member of the National Guard. A similar form was sent on October 4, 1967.

After receipt of the February 17th form petitioner's Local Board withdrew his I–D classification and reclassified him I–A. Subsequent to being reclassified petitioner applied to his Local Board for classification as a conscientious objector. His application was denied and petitioner filed an appeal. On September 15, 1967, petitioner was notified that since his induction was not imminent his appeal would not be submitted to the appeal board until 120 days prior to his probable induction. No further action has been taken on this appeal.

In April of 1967, petitioner talked to his commanding officer about being discharged from the National Guard as a conscientious objector but was unable to "communicate" with him. On or about July 26, 1967, petitioner wrote to his National Guard unit requesting confirmation of his discharge from the National Guard and asking for a discharge if one had not already been granted. He also requested information on how to apply for conscientious objector status. In August of 1967 petitioner again wrote to his unit commander and the State Adjutant General requesting a discharge and a DA form 1049 in order to apply for discharge as a conscientious objector.

On August 14, 1967, a letter was sent to petitioner informing him that the appropriate forms for application were available at the Armory in Mankato and that it was necessary for him to come to Mankato to clear his records and to be informed of his rights. Petitioner denies receiving this letter. From the record it appears that from September of 1967 until

January 2, 1968, petitioner had no further contact with the National Guard. On January 2, 1968, petitioner received orders to report for active duty on January 17, 1968, at Fort Leonard Wood, Missouri, for a period of one year, six months, and sixteen days. On January 9, 1968, petitioner wrote to the Headquarters Fifth Army, Fort Sheridan, Illinois, requesting a rescission and postponement of his "induction notice" until his application for discharge had been processed.

Petitioner also contacted his attorney and a Mr. Sherk, the Executive Secretary of the National Service Board for Religious Objectors, in Washington, D.C. Mr. Sherk contacted a Mr. Kenneth B. Haggett of the National Guard Office in Washington, who apparently assured Mr. Sherk that petitioner's order to active duty would be delayed or cancelled until petitioner's application for discharge was processed..

On or about February 1, 1968, petitioner received a telegram informing him that the order of January 2, 1968, had not been cancelled. On the 9th of February petitioner received in the mail his honorable discharge from the Minnesota National Guard with the effective date of January 16, 1968. On May 30, 1968, an Absentee Wanted Form was issued, and on August 16, 1968, petitioner was arrested as a deserter.

Petitioner raises three issues in his petition for a writ of habeas corpus. First, petitioner argues that his application for discharge as a conscientious objector must be processed by the proper authorities before there can be any order for active duty or participation inconsistent with his claimed beliefs.

Second, petitioner argues that the National Guard returned jurisdiction over petitioner to the Selective Service System when it reported that petitioner was no longer participating satisfactorily.

Third, petitioner argues that his Enlistment Agreement provides for sanctions in the event of failure to serve satisfactorily and that an order to active duty for more than forty-five days is a violation of his agreement.

Petitioner's first argument is based on paragraph 6 of Army Regulation 635–20, which provides:

> "[A]n individual who applies for discharge based on conscientious objection will be retained in his unit and assigned duties providing minimum conflict with his professed beliefs pending a final decision on his application * * *."

This regulation applies only to members of the Army on active duty. The applicable regulation is Cir. 135–25 which covers members of reserve components. This regulation does not provide for release from conflicting duties. For this reason Cir. 135–25 is not a bar to petitioner's call to active duty, even assuming that a proper application had been made.[1]

Petitioner's second argument is based in part upon Mader v. Clifford, No. 48612 (N.D. Calif. July 26, 1968). In *Mader* plaintiff was certified to his draft board as an unsatisfactory participant in the reserves while his application for a conscientious objector discharge was being processed. Petitioner was reclassified I–A by his draft board. After his application for discharge was disapproved, plaintiff was certified for priority induction as an unsatisfactory participant in the reserves. Subsequently plaintiff was ordered to active duty by the Marine Corps for a period of twen-

[1] The Court has not passed on the validity of petitioner's application for a discharge based on conscientious objection, for the reason that it appears that a proper application has not been filed. Both of the regulations concerning conscientious objection discharges require extensive information, references, in-

ty months. Plaintiff refused to obey this order and was declared a deserter. The District Court stated:

"[A]ssuming the Marine Corps had a choice to certify plaintiff to his draft board as an unsatisfactory participant or to order him to active duty as an unsatisfactory participant, once it chose to certify him to the draft board as an unsatisfactory participant, it could not deny him the procedural rights of review and appeal of his I–A classification. Therefore, the subsequent order to report for active duty would be invalid * * *."

Here petitioner was never certified for priority induction.

Under 50 U.S.C. App. § 456(c)(2)(C) petitioner was not exempt from "registration or training [or] service by induction" under the Universal Military Training and Service Act because he was a member of the National Guard. He was, however, eligible to be placed in the I–D class for National Guard members who are participating satisfactorily. 32 C.F.R. § 1622.13. Because he was no longer eligible to be placed in this category, petitioner was reclassified by his Local Board. That this was a separate process from being certified for priority induction may be inferred by this reclassification. Priority induction is governed by 32 C.F.R. § 1631.8, which provides that any person who is certified for induction "shall be

terviews, and counseling sessions. If petitioner wishes to maintain his position that the two letters of August and September of 1967 constitute an application for discharge, that is his privilege. However, it is the Court's opinion that an application based on the information contained therein would be denied. The Court holds that petitioner's call to active duty is not barred by Cir. 135–25 and does not pass on the issue of whether his application is sufficient or whether petitioner must be "assigned to duties providing a minimum conflict with his professed beliefs" when he is placed on active duty.

ordered to report for induction by the local board regardless of the class in which he is classified and *without changing his classification.*" [Emphasis added.] This regulation makes reclassification unnecessary if the person is to be inducted for failure to satisfactorily perform his National Guard duties. Since petitioner was not certified for priority induction, the *Mader* case does not apply and the petition cannot be granted on these grounds.

Petitioner also argues that his discharge from the National Guard ended any obligation he may have had to the Armed Forces and returned jurisdiction over him to the Selective Service System. This argument is based on the fact that the Enlistment Record which petitioner signed contains two oaths of enlistment—one for service in the National Guard and another for service in the Regular Army or Army Reserve. Petitioner signed only the National Guard oath. This oath provides:

> "I do hereby acknowledge to have voluntarily enlisted this 28th day of December, 1963, in the Army National Guard of the State of Minnesota and as a Reserve of the Army with membership in the Army National Guard of the United States for a period of (6) six years under the conditions prescribed by law, unless sooner discharged by proper authority."

Petitioner's Enlistment Agreement also provides for service as a Reservist. In addition, 10 U.S.C. § 269(b) provides that "[T]he units and members of the Army National Guard of the United States * * * are in the Ready Reserve of the Army * * *."

On the basis of petitioner's Enlistment Record, Enlistment Agreement, and § 269(b) it is clear that petitioner was serving in the dual capacity of National Guard member and Ready Reservist. It is also clear

that petitioner's discharge from the National Guard did not relieve him of his Ready Reserve obligation, but was only for the purpose of giving jurisdiction over him to the Ready Reserve as set forth in Cir. 135–10 para. 13(b). Paragraph 13(b) provides:

> "State adjutants general will identify to the appropriate area commander those ARNGUS members who are to be ordered to active duty as Reserves of the Army. Members so identified will be discharged from their ARNG status by the State Adjutant General, effective the day prior to the date the member is scheduled to report to active duty."

Petitioner's third argument is that the sanctions for unsatisfactory participation in the Army National Guard of Minnesota are limited by his Enlistment Agreement which states:

> "If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of 45 days or be reported to Selective Service for immediate induction."

Petitioner was ordered to active duty pursuant to 10 U.S.C. § 673a, enacted June 30, 1967, which provides:

> "(a) Notwithstanding any provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—
>
> (1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;
>
> (2) has not fulfilled his statutory reserve obligation; and
>
> (3) has not served on active duty for a total of 24 months.
>
> "(b) A member who is ordered to active duty under this section may be required to serve on active duty until his total service on active duty equals 24 months. If his enlistment or other pe-

riod of military service would expire before he has served the required period under this section, it may be extended until he has served the required period."

Petitioner claims that the application of § 673a to him was in violation of his Enlistment Agreement and deprived him of valuable contract rights without due process of law, since he had enlisted prior to its enactment.

The applicability and constitutionality of § 673a has been discussed in a series of recent cases involving the call to active duty of reservists for disciplinary and other reasons. Winters v. United States, 281 F. Supp. 289 (E.D.N.Y.1968), aff'd, 390 F. 2d 879 (2d Cir. 1968); Gion v. McNamara, Civil No. 67–1963–S (C.D. Calif. January 8, 1968); Fox v. Brown, 286 F. Supp. 855 (S.D.N.Y.1968); Ali v. United States, 289 F. Supp. 530 (C.D. Calif. July 2, 1968); Pfile v. Corcoran, 287 F. Supp. 554 (D.Colo. July 19, 1968); Even v. Clifford, 287 F. Supp. 334 (S.D. Calif. 1968); Morse v. Boswell, 289 F. Supp. 812 (D.Md. August 6, 1968).

In both *Winter* and *Fox* the enlistment contract contained a provision which could be interpreted as subjecting the enlistee to the effect of subsequently enacted legislation. Petitioner's Enlistment Agreement contains no such language[2] and for this reason

[2] Petitioner's oath of enlistment contains the words "under the conditions prescribed by law." In Pfile v. Corcoran, 287 F. Supp. 554 (D. Colo. July 19, 1968), the Court recognized that this oath, if it constituted the contract, might be construed to incorporate future changes in the law. However, the Court held that the "specific, detailed Statement of Acknowledgement [Enlistment Agreement] constituted the enlistment contract, rather than the brief, more general oath." To the extent that the relationship between petitioner and the armed forces is based on contract, this is the proper conclusion. Therefore this Court must look to the Enlistment Agreement.

these cases are not directly in point. *Boswell* and *Ali* involved the call up of units of reservists and unassigned reservists, respectively, and therefore are not directly in point.

In *Gion* a reservist who had enlisted prior to June 30, 1967, was ordered to active duty for a period of sixteen months for unsatisfactory participation in the Ready Reserve pursuant to § 673a. The Court held:

> "1. Petitioner's status as Ready Reservist is based upon contract. In accordance with said contract Petitioner may not be ordered without his consent to perform more than forty-five (45) days of additional duty for training for unsatisfactory participation in the Ready Reserve.
>
> "2. The ordering of Petitioner to involuntary active duty for more than forty-five (45) days because of unsatisfactory participation in the Ready Reserve, pursuant to authority derived from * * * [10 U.S.C. § 673a], constituted a violation of Petitioner's enlistment contract, and application of said Public Law as to Petitioner constituted a violation of the due process clause of the Fifth Amendment to the Constitution of the United States."

Petitioner relies upon *Gion* to support his claim that his order to active duty was in violation of his Enlistment Agreement and the due process clause.[3]

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[3] *Gion* is of doubtful precedential value since on very similar facts the Court in *Winters* held that § 673a was not a violation of the enlistment contract. In *Winters*, the Court stated:

> "Both the enlistment contract and the Statement of Understanding contemplate that the obligations which the enlisted man undertakes include not only additional active duty imposed in a national emergency or in time of war but also additional active duty 'otherwise prescribed by law' or 'as the law may require.' Neither the enlistment contract nor the Statement of Understanding says in so many words that it means duty prescribed by law whether already enacted or hereafter passed, but that is the evident

However, the *Gion* opinion fails to deal with two important questions concerning the application of § 673a. First, does § 673a deprive a reservist of any substantial contract rights; and, second, if it does, may these rights be abrogated by the sovereign, constitutionally, in the exercise of a paramount power?

The Court in Even v. Clifford, *supra*, answered the first question negatively, noting that a reservist reported to the Selective Service for priority induction may be required to serve twenty-four months on active duty, whereas under § 673a the delinquent reservist is given credit for active duty already served. The Court stated:

> "Under [§ 673a] petitioner has not been deprived of any substantial rights under his en-

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and necessary meaning of any language so used in such instruments. Were such instruments construed otherwise they would in effect fetter and embarrass the power of the President and Secretary of Defense to adopt uniform and practical regulations for the administration of the armed forces and the Ready Reserve, and could indeed operate as a fetter upon Congress itself, which would have to take action in contemplation of the existence of a large number of such agreements in force at any one time, and which it would be only appropriate, even if not necessary, that Congress should consider in enacting new law."

Moreover, the rationale of the *Gion* case has not been followed by the District Court which decided it. In *Ali* the Court stated:

> "[A] military enlistment contract is not an insulating document which legally prevents the Government of the United States from recalling to active duty an enlistee pursuant to an act of Congress which was passed after the date of enlistment although such recall is not expressly provided for in the terms of his enlistment contract; and that in this case, the recall of the plaintiffs to active duty was not tied to their respective enlistment contracts but was predicated upon Congress' right to raise an Army, as well as [§ 673a] * * * *"

listment contract. In fact, petitioner's position has been improved for the reasons previously noted. To hold the government strictly bound by the enlistment contract in this case would indirectly fetter the power of Congress to enact uniform and practical regulations for the administration of the armed forces." 287 F.Supp. at 338.

The Court in Pfile v. Corcoran answered the second question affirmatively. The Court stated:

> "Under certain circumstances the legislature has power, as an attribute of sovereignty, to enact laws which alter existing contracts, whether made between private parties or between the Government and private citizens. See City of El Paso v. Simmons, 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446 (1965).
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> "* * * [A]brogation of contracts by the legislature is permissible where the abrogation occurs through the exercise of some paramount power of the sovereign, and the abrogation operates to further the ends sought to be achieved in the exercise of this power.
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> "The present statute can be regarded as falling within the 'wide discretion' which Congress possesses in the exercise of its powers 'to declare war,' (Const., Art. I, sec. 8, cl. 11), 'to raise and support armies,' (Const., Art. I, sec. 8, cl. 12), and 'to make rules for the government and regulation of the land and naval forces' (Const., Art. I, sec. 8, cl. 14). These are collectively known as the War Powers, and the statute appears validly applicable to petitioner, even if it contravenes his enlistment contract. It

> is unnecessary to determine whether the present conflict is a state of war. It is sufficient to note that the condition is scarcely a state of peace, and that the action of Congress is in the interests of national security. Finally, we are constrained to hold that a contract such as the present one always stands in the shadow of the exercise by Congress of positive paramount sovereign powers."

In this case, as in *Even,* since petitioner was subject to priority induction for twenty-four months under his Enlistment Agreement and for active duty for extended periods under other statutes, see *e.g.*, 10 U.S.C. §§ 672(a) and 673(a), § 673a does not deprive him of any substantial contract rights without due process of law. In addition, assuming the rationale of *Even* does not apply, the rationale of *Pfile* does, and petitioner's contract must give way before the exercise by Congress of the War Powers.

For the above stated reasons petitioner's application for a writ of habeas corpus must be denied.